86-227

No. _____

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

VICTOR RIDLEY,
Specialist Four, United States Army,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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PAMELA G. MONTGOMERY
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QUESTION PRESENTED

Whether the petitioner's sixth amendment right of confrontation was violated when, over defense objection, an evaluative police laboratory test, which was the sole government evidence, was admitted into evidence, without the testimony of the laboratory analyst who conducted the test.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. ———

VICTOR RIDLEY,
Specialist Four, United States Army,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Specialist Four Victor Ridley, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of United States Court of Military Appeals is reported at —— M.J. —— (C.M.A. 1986) (Appendix A). The opinion of the Army Court of Military Review is unpublished, SPCM 20471 (A.C.M.R. 30 Jan. 1985) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on June 16, 1986, affirming petitioner's conviction dated March 23, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides:

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

Military Rule of Evidence, 803(6) admits:

Records of regularly conducted activity. A memorandum, report, record, or data compilation, . . . if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, ... Among those memoranda, reports, records, or data compilations normally admissible pursuant to this paragraph are forensic laboratory reports. . . .

STATEMENT OF THE CASE

On July 8, 1983, First Lieutenant (1LT) Bryan Sampson smelled what he considered to be the aroma of marijuana coming from a room assigned to Specialist Four (SP4) Robert E. Anthony and SP4 John N. Treadway. A prompt investigation of the room revealed the presence of Private First Class (PFC) Anthony Hunter, SP4 Robert E. Anthony, and the petitioner. Marijuana was found on and under SP4 Anthony's bed, in his clothes, and in his wall locker (R. 33, 66, 99, 100-101, Prosecution Exhibits 1, 3-7 inclusive). No evidence of marijuana was found on or near the petitioner (R. 94) in spite of an extensive search of petitioner's shirt, boots, pants pockets, wallet, and hat (R. 55). A search of the petitioner's room met with negative results.

On July 13 or 14, 1983, the petitioner, Specialist Four Anthony and the others provided urine specimens to the Alcohol and Drug Testing representatives. Specialist

Four Anthony's urine sample did not reveal THC,[1] (R. 201a) while the report of the petitioner's urinalysis reflected a result of "Positive THC" (Prosecution Exhibit 8).

Petitioner was tried by a military judge sitting as special court-martial on November 3 and December 5, 1983. Contrary to his pleas, he was found guilty of wrongful use of marijuana and willful disobedience of an order to submit to a urinalysis test, in violation of Articles 134 and 90 of the Uniform Code of Military Justice, 10 U.S.C. §§ 934 and 890. The court sentenced him to a bad conduct discharge, confinement for two months, partial forfeitures, and reduction to the grade of Private E-1. The Army Court of Military Review affirmed the findings and sentence (Appendix B).

At trial, the petitioner's defense counsel objected to the admission of Prosecution Exhibit 8 (urinalysis custody and report record) stating:

> *I did not have any opportunity to cross-examine the persons who actually performed the urinalysis.* And so, we object on the basis that it's not the best evidence and *does not give the accused the opportunity to cross-examine.*

R. (170) (emphasis added).

The military judge denied the motion, and admitted the laboratory report which, other than petitioner's mere presence in the room, was the sole evidence of marijuana use by the petitioner.

The issue granted by the United States Court of Military Appeals, as a prerequisite to this Court's jurisdiction, was as follows:

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[1] THC identifies Delta-9-Tetrahydroxycannibinol, a metabolite whose presence tends to show that the person "had at some prior time ingested or inhaled marihuana." Murray v. Haldeman, 16 M.J. 74, 76 (C.M.A. 1983).

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF THE APPELLANT BY ADMITTING IN EVIDENCE PROSECUTION EXHIBIT 8 (URINALYSIS CUSTODY AND REPORT RECORD) OVER DEFENSE OBJECTION.

REASONS FOR GRANTING THE WRIT

The Court of Military Appeals based its affirmation of petitioner's conviction of wrongful use of marijuana on the premise that the admission of a police laboratory report of urinalysis without the testimony of the laboratory analyst who conducted the test is not violative of the confrontation clause of the sixth amendment. This viewpoint is contrary to the policy announced more than ninety years ago by the Court that the purpose of the confrontation clause was to prevent "depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness. . . ." *Mattox v. United States*, 156 U.S. 237, 242 (1895). The laboratory report introduced in this case to prove the "single most damaging fact against the [petitioner] [2] fall[s] into the category of the dreaded, *ex parte* affidavit." [3] *State v. Henderson*, 554 S.W.2d 117, 120 (Tenn. 1977).

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[2] In this case, and in a number of the reported cases, the laboratory report is directly relevant to an essential element of the offense. See United v. Scholle, 553 F.2d 1109, 1123-25 (8th Cir. 1977), *cert. denied*, 434 U.S. 940 (1977); United States v. Frattini, 501 F.2d 1234, 1235-37 (2d Cir. 1974); United States v. Parker, 491 F.2d 517, 520-21 (8th Cir. 1973), *cert. denied*, 416 U.S. 989 1974); United States v. Miller, 23 C.M.A. 247, 249-50, 49 C.M.R. 380, 381 (1974); United States v. Evans, 21 C.M.A. 579, 45 C.M.R. 353 (1972).

[3] The laboratory report in this case is perhaps more harmful than an *ex parte* affidavit since the results were not recorded under oath, nor was the identity of the laboratory analyst provided. The

With the increasing use of scientific evidence, and the concomitant strain on police laboratories, evaluative police laboratory reports do not meet the constitutional requirements of reliability.[4] This petition presents the Court with an opportunity to determine the constitutional limits of evaluative police laboratory reports which comprise an essential element of an offense. Appellate courts are divided on this issue.[5]

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laboratory report is analogous to the psychiatric report held inadmissible in Phillips v. Neil, 452 F.2d 337 (6th Cir. 1971), *cert. denied*, 409 U.S. 884 (1972) where the psychiatric report did not indicate who made the opinion or the basis relied upon.

[4] *See* Imwinkelried, *The Constitutionality of Introducing Evaluative Laboratory Reports Against Criminal Defendants*, 30 Hastings L.J. 621 (1979) [hereinafter cited as *Imwinkelried*].

[5] The following courts do not find a constitutional violation: Kay v. United States, 255 F.2d 476 (4th Cir.), *cert. denied*, 358 U.S. 825 (1958) (blood alcohol report admitted under certificate in a drunk driving case); State v. Cosgrove, 181 Conn. 562, 436 A.2d 33 (1980) (state toxicologist's report that substance is marijuana); Howard v. United States, 473 A.2d 835 (D.C. Cir. 1984) (Drug Enforcement Agency chemist's certified report that substance is heroin); State v. Malsbury, 186 N.J. Super. 91, 451 A.2d 421 (1982) (county forensic laboratory report that substance is marijuana). The following courts do find a constitutional violation: State v. Henderson, 554 S.W.2d 117 (Tenn. 1977) (state toxicology report identifying substances to be lysergic acid diethylamide and marijuana); Commonwealth v. McCloud, 457 Pa. 310, 322 A.2d 653 (1974) (autopsy report improperly admitted to prove legal causation of death); Gregory v. State, 40 Md. App. 297, 391 A.2d 437 (1978) (report of medical staff conference improperly admitted to show the defendant was criminally responsible); Moon v. State, 300 Md. 354, 478 A.2d 695 (1984), *cert. denied*, 105 S.Ct. 1170 (1985) (blood alcohol and osmolality tests in an automobile manslaughter case). *See also* United States v. Oates, 560 F.2d 45 (2d Cir. 1977) (chemist report is not a business record under Federal Rule of Evidence 803(6) [Fed. R. Evid.] and also excluded under Fed. R. Evid. 803(8).

I. THE POLICE LABORATORY REPORT OF URINALYSIS DOES NOT BEAR THE "INDICIA OF RELIABILITY" OF MORE TRADITIONAL BUSINESS RECORDS SINCE IT WAS MADE FOR ITS "POTENTIAL LITIGATION VALUE."

The hearsay exception for regularly kept business records is justified by the unusual reliability of their accuracy.[6] Such records are periodically reviewed by audits or other validating procedures. Organizations routinely depend on the accuracy of these records in order to function properly. McCormick on Evidence § 306 (3d Ed. E. Cleary, 1984). For example, the standardization of the practice of recording medical facts concerning patients has resulted in certain hospital records being accorded a high degree of reliability, and life and death decisions are based on their accuracy.[7] *Id.* § 313.

The determination that THC was present in the petitioner's urine is an opinion, based on inferences made during the analysis of the urine. It is an evaluation, not a "fact" in the common usage of that term. *Id.* § 12.

Further, the police laboratory report, unlike routine hospital records or other regularly kept records, cannot be said to realistically be made for any purpose other than its "potential litigation value." *State v. Henderson*, 554 S.W.2d 117, 120 (Tenn. 1977).

The purpose of the police laboratory report introduced in this case is no different than that condemned in *Pal-*

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[6] In Mancusi v. Stubbs, 408 U.S. 204, 213 (1972) this Court stated that the confrontation clause requires an extrajudicial hearsay statement to bear sufficient "indicia of reliability" to provide an adequate basis to test the truthfulness of the statement before it is admissible.

[7] Courts can limit the use of hospital records where the diagnostic opinion is speculative, and not based on objective data. *See* Boland v. Jando, 395 S.W.2d 206 (Mo. 1965) (interpretation of X-rays, where record stated "could be a small chip fracture," excluded by the court as being speculative).

mer v. Hoffman, 318 U.S. 109 (1943) where the Court held inadmissible a railroad engineer's written accident report. The Court stated, "[the report] is not a record made for the systematic conduct of the business as a business. . . . Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like, these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading." *Id.* at 113-114.

In *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977), the court held that a laboratory report is inadmissible as a regularly kept record under Federal Rule of Evidence 803(6).[8] The court there stated:

> If we were to construe FRE 803(6) in an overly literal fashion and find that the chemist's report and worksheet constituted "business records" under that rule, the collision [between the Rule and the Confrontation Clause of the Constitution] which the Congress so assiduously tried to "avoid inviting" would be that much nearer to occurring.

Id. at 80.

The laboratory report in this case is not analogous to a bill of lading or payroll record. The report was not made as part of the laboratory's internal control system, but as an analysis of evidence seized once the petitioner was suspected of committing an offense.[9] Nor can it be

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[8] In contrast to Fed. R. Evid. 803(6), Mil. R. of Evid. 803(6) has codified the Court of Military Appeals' decisions and included forensic laboratory reports as business records. Mil. R. Evid. 803(6) has also deleted the provision which excluded a record "made principally with a view to prosecution, or other disciplinary or legal action." *See* Analysis to Mil. R. Evid. 803(6).

[9] Several courts have held that when a record is made for a purpose other than a regular business purpose as was the laboratory

said that the laboratory analyst [10] was merely seeking to "establish an instrinsically neutral fact." *United States v. Evans*, 21 C.M.A. 579, 45 C.M.R. 353 (1972). The laboratory report indicating the presence of THC in the urine was an essential element which the government had the burden to prove beyond a reasonable doubt.

To allow the government to prove the very essence of the offense by means of an unsworn written report untestable by cross-examination, instead of calling a witness who has not been shown to be unavailable,[11] is the antithesis of the adversarial system from which truth emerges. *See State v. Henderson*, 554 S.W. 117 (Tenn. 1977) (admission in evidence of a toxicology laboratory report through a witness other than one who performed the test violated the defendant's constitutional right of confrontation).

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report in this case, it does not fall within the hearsay exception for regularly kept records and should not be admitted. *See* United States v. Kim, 193 App. D.C. 370, 595 F.2d 755 (1979); Seattle First Nat. Bank v. Randall, 532 F.2d 1291, 1296 (9th Cir. 1976); Hiram Ricker and Sons v. Students International Meditation Society, 501 F.2d 550 (1st Cir. 1974); United States v. Middlebrooks, 431 F.2d 299, 302 (5th Cir. 1970), *cert. denied*, 400 U.S. 1009 (1971).

[10] *See* the vigorous dissent in State v. Rhone, 555 S.W.2d 839 (Mo. 1977), where Judge Bardgett of the Supreme Court of Missouri states that the laboratory analyst must be viewed as "a member of the prosecuting team." *Id.* at 847.

[11] Military case law holds that the government is not required to call the laboratory analyst as a witness. Instead the defense may request the laboratory analyst as a witness, after making a showing that possible discrepancies may exist in the report. United States v. Vietor, 10 M.J. 69 (C.M.A. 1980); United States v. Strangstalien, 7 M.J. 225 (C.M.A. 1979). This viewpoint confuses the confrontation clause with the compulsory process clause and effectively abolishes the accused's right of confrontation. *See* Gilligan and Lederer, *Compulsory Process and Confrontation*, 101 Mil. L. Rev. 1, 76-79 (1983).

II. THERE IS A SUBSTANTIAL LIKELIHOOD THAT THE POLICE LABORATORY REPORT OF URINALYSIS CONTAINS SUBSTANTIVE ERROR AND THUS THE REPORT IS CONSTITUTIONALLY UNRELIABLE.

Scientists have only recently been able to detect THC metabolites in urine. After several unsuccessful efforts to develop a test, several immunoassay tests were developed in the mid-1970's.[12] In the early 1980's Doctors John Whiting and William W. Manders, of the Armed Forces Institute of Pathology, developed a test using a gas chromatograph equipped with a flameionization detector [13] to detect THC metabolites after urine samples have been screened by radioimmunoassay.[14] After development of the GC/FID, the Department of Defense issued a memorandum which eliminated the ban against utilizing compulsory drug analysis results in disciplinary proceedings.[15]

Dr. William Manders, one of the developers of GC/FID, has stated that "basing punishment on just one positive urinalysis is not right. There is too much margin for error. These tests were never meant to be used as evidence." [16]

Studies of GC/FID and radioimunoassay have shown that both procedures are screening tests and insufficiently reliable to make the determination of the presence of the THC metabolite in urine. These tests cannot distinguish the THC metabolite from other compounds in

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[12] *See* Wiesner, *Urinalysis: Defense Approaches,* 15 The Advocate 114 (1982).

[13] Hereinafter referred to as GC/FID.

[14] Whiting and Manders, *Confirmation of a Tetrahydrocannibinol Metabolite in Urine by Gas Chromatograph,* 6 Journal of Analytical Toxicology, January/February 1982: [hereinafter referred to as *Whiting and Manders*].

[15] Department of Defense Policy Memorandum, Dec. 28, 1981.

[16] "Acquittal Won't Change Use of Drug Test," Army Times, Jan. 16, 1984.

the urine which react similarly to THC under test conditions.[17]

In addition to the unreliability of the laboratory tests themselves, studies have shown the fallibility of the police laboratories in determining accurate results. A panel of military and civilian experts in a study of four Army/Air Force laboratories found substantial rates of error. For example, at Fort Meade Laboratory, the panel found that prior to November 15, 1983, radioimmunoassay results confirmed only by GC/FID would be scientifically and legally supportable in less than ten percent of the cases.[18] *See* Review of Urinalysis Drug Testing Program, p. 20. The findings of the panel are comparable to those reported in 1974 by the Laboratory Proficiency Testing Program where in one test the laboratories were asked to determine if two blood stains shared a common origin, and only 37.4% of the laboratories reached the accurate conclusion. *See Imwinkelried, supra* n.4 at 636-637 reporting the results of the Project Advisory Committee, Laboratory Proficiency Testing Program, Supplementary Report (prepared for the United States Department of Justice) (on file with the Hastings Law Journal).

Considering the problems with urinalysis tests in accurately detecting THC metabolites in urine, the fallibility of police laboratories in determining accurate results, and the lack of cross-examination by the petitioner to question whether the tests were properly performed,

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[17] Review of Urinalysis Drug Testing Report by a Panel of Army and Civilian Experts in Toxicology and Drug Testing Legal Issues for the Surgeon General of the U.S. Army, December 12, 1983—Legal Addendum pp. 15-17. [hereinafter cited as *Review of Urinalysis Drug Testing Program*]

[18] The study also reported the accuracy rates at the three other laboratories ranged from 25%-95%. Review of Urinalysis Drug Testing Program *supra*, at p. 20.

whether the laboratory equipment was in proper working order, and the qualifications of the laboratory analyst, there is a substantial likelihood that the laboratory report admitted in evidence against the accused is erroneous.[19]

III. THE ADMISSION OF THE POLICE LABORATORY REPORT SUBSTANTIALLY PREJUDICED THE PETITIONER.

In this case, the laboratory report was "critical evidence . . . pertaining directly to the [petitioner's] ultimate guilt." *Gregory v. State*, 40 Md. App. 297, 391 A.2d 437, 455 (1978). Without the report, there is no direct evidence that the petitioner used marijuana. The only other evidence was his presence in a room which smelled of marijuana. Mere presence at the scene of a crime is not a sufficient basis of guilt. The laboratory report was "crucial" to the government's case and "devastating" to the defense case. *Dutton v. Evans*, 400 U.S. 74, 87 (1970). Its admisison as the sole evidence of an essential element of the offense violated the petitioner's sixth amendment right to confront and cross-examine the witnesses against him. *See State v. Matousek*, 287 Minn. 344, 178 N.W.2d 604 (1970). Since the laboratory report was the key evidence in the case against the petitioner, its admission was an error of constitutional dimensions that was not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967).

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[19] The petitioner's test results were confirmed as positive by the gas chromotagraph/mass spectroscopy (Prosecution Exhibit 12 for identification), a test that is accepted in the scientific community as a means of identifying drugs. *See* Review of Urinalysis Drug Testing Program—Legal Addendum pp. 10-12. However, these test results were not admitted into evidence (R. 170).

CONCLUSION

For the reasons stated above, including the importance of the constitutional issue involved, the petition for certiorari should be granted. The resolution of the issue is critical to the preservation of an accused's constitutional right of confrontation and cross-examination.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 52087/AR
CMR Dkt. No. 20471

UNITED STATES,

Appellee

v.

VICTOR RIDLEY (396-74-3403),

Appellant

MEMORANDUM OPINION AND ORDER

Appellant was tried by special court-martial at Fort Ord, California, on November 3 and December 5, 1983. The military judge found appellant guilty, despite his pleas, of wrongful use of marihuana and willful disobedience of an order to submit to a urinalysis test, in violation of Articles 134 and 90, Uniform Code of Military Justice, 10 U.S.C. §§ 934 and 890, respectively. He was sentenced to a bad-conduct discharge, confinement for 2 months, partial forfeitures, and reduction to pay grade E-1. The convening authority approved this sentence and the Court of Military Review affirmed in a short-form opinion.

We granted review of the following issues:

I

WHETHER THE EVIDENCE IS SUFFICIENT AS A MATTER OF LAW AND FACT TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT WRONGFULLY AND KNOWINGLY USED MARIHUANA AS ALLEGED IN SPECIFICATION 1 OF CHARGE I.

II

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF THE APPELLANT BY ADMITTING IN EVIDENCE PROSECUTION EXHIBIT 8 (URINALYSIS CUSTODY AND REPORT RECORD) OVER DEFENSE OBJECTION.

III

WHETHER THE EVIDENCE IS SUFFICIENT AS A MATTER OF LAW AND FACT TO PROVE BEYOND A REASONABLE DOUBT THAT ON OR ABOUT 29 SEPTEMBER 1983 THE APPELLANT WILLFULLY DISOBEYED A LAWFUL COMMAND OF 1LT SAMPSON TO SUBMIT TO A URINALYSIS TEST.

We have examined the record of trial in this case in light of *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986), and resolve issue I against appellant. *See Jackson v. Virginia*, 443 U.S. 307 (1979). Moreover, we resolve issues II and III against appellant on the basis of *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983); *United States v. Porter*, 12 M.J. 129 (C.M.A. 1981); *United States v. Armstrong*, 9 M.J. 374 (C.M.A. 1980); and *United States v. Strangstalien*, 7 M.J. 225 (C.M.A. 1979). Accordingly, it is, by the Court, this 16th day of June, 1986,

ORDERED:

That the decision of the United States Army Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (MONTGOMERY)
Appellate Government Counsel (BENJAMIN)

UNITED STATES ARMY COURT OF MILITARY REVIEW

Before

McKAY, WATKINS, and LYMBURNER
Appellate Military Judges

SPCM 20471

7th Infantry Division and Fort Ord

G. C. Ryker, Military Judge

UNITED STATES,

Appellee

v.

Specialist Four VICTOR RIDLEY, 396-74-3403,
United States Army,

Appellant

Lieutenant Colonel Arthur L. Hunt, JAGC, and Captain Frank J. DiGiammarino, JAGC, were on the pleadings for appellant.

Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, Lieutenant Colonel Thomas M. Curtis, JAGC, and Captain Thomas J. Benjamin, JAGC, were on the pleadings for appellee.

---

30 January 1985

MEMORANDUM OPINION

Per Curiam:

The Court having found the approved findings of guilty and the sentence correct in law and fact and having determined on the basis of the entire record that they should be approved, such findings of guilty and the sentence are *AFFIRMED.*

FOR THE COURT:

/s/ William S. Fulton, Jr.
WILLIAM S. FULTON, JR.
Clerk of Court

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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

VICTOR RIDLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Whether the admission at petitioner's court-martial of the laboratory report of petitioner's urinalysis test violated the Confrontation Clause.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-227

VICTOR RIDLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-2a) is reported at 22 M.J. 351. The opinion of the Army Court of Military Review (Pet. App. 3a-4a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on June 16, 1986. The petition for a writ of certiorari was filed on August 14, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. II) 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried by a special court-martial at Fort Ord, California. Petitioner was convicted of the willful disobedience of a superior commissioned officer, in violation of Article 90 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 890, and of the wrongful use of marijuana, in violation of Article 134, UCMJ, 10 U.S.C. 934. He was sentenced to two months' confinement, a bad conduct discharge, partial forfeiture of his pay, and a reduction in rank. The convening authority reviewed the case pursuant to Article 60, UCMJ, 10 U.S.C. (Supp. III) 860, and approved the sentence. The Army Court of Military Review affirmed the findings and sentence (Pet. App. 3a-4a). The Court of Military Appeals affirmed in a memorandum opinion (Pet. App. 1a-2a).

1. The first charge against petitioner—the wrongful use of marijuana—stemmed from an incident that occurred on July 8, 1983. On that day, Lieutenants Bryan Sampson and Michael Boss and Staff Sergeant Ellis Kendall, Jr., noticed the strong odor of marijuana emanating from a room assigned to enlisted men John Treadway and Robert Anthony (Tr. 27, 60). Upon entering the room, Lieutenants Sampson and Boss and Sergeant Kendall discovered petitioner, Treadway, and Anthony. A search of the room revealed marijuana in several areas controlled by Anthony, as well as a large amount of marijuana in a common area (*id.* at 33, 63-67, 99-101). Approximately five days later, petitioner was ordered to submit a urine sample for testing (*id.* at 88). That sample tested positive for marijuana (GX 8).

The other charge against petitioner—willful disobedience of an order by a superior commissioned

officer—arose from his refusal to provide a second urine sample two months later. In September 1983, petitioner appeared to be under the influence of an intoxicant while he was on base, and he was ordered to provide a urine sample. Although he was given several opportunities to provide a sample, petitioner refused to do so (Tr. 37-44, 103-107, 151-154, 155-157). Petitioner does not challenge his conviction for that offense.

2. At trial, petitioner's counsel indicated in his opening statement that he would object to the government's introduction of the laboratory report of petitioner's positive urinalysis result, on the ground that it was "contrary to the best evidence rule" and denied him the opportunity to cross-examine the persons who had performed the urinalysis tests (Tr. 21-22). During trial, the trial judge took judicial notice (*id.* at 169) of the document that establishes guidelines for the secure handling and testing of samples processed through all Army drug testing laboratories. Office of the Surgeon General, Dep't of the Army, *Standing Operating Procedure: Chain of Custody Procedures for Collection, Handling and Testing of Urine Specimens* (May 25, 1983) [hereinafter cited as *Urine Testing SOP*].[1] The *Urine Testing SOP* provided the

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[1] The guidelines provide that each urinalysis laboratory report must contain the following certification, signed by a laboratory certifying official (*Urine Testing SOP* 9):

> "I certify that I am a laboratory certifying official and that I am the official records custodian of this laboratory. I further certify that the attached DA Form 5180-1-R (Test), with gas chromatography tracing attached, and DA Form 5180-2-R (Test) were prepared in accordance with official procedure promulgated by The Surgeon General and in the regular course of business of this laboratory, and that they are true and accurate copies of the

necessary foundation for the admission of the laboratory report of petitioner's urinalysis test under Mil. R. Evid. 803(6).[2] Petitioner objected to the introduction of the test result, on the grounds that it was "not the best evidence and does not give the accused the opportunity to cross-examine" (Tr. 170).[3] Petitioner did not attempt to compel the production of any laboratory personnel, nor did he in any manner challenge the reliability of the tests.[4] Instead, his

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originals kept in the official files of this laboratory and maintained by me."

The laboratory report on petitioner's urine specimen contained that certification (GX 8, at 1).

[2] The prosecution also called Mr. Daryle Olsen, chief of the alcohol and drug abuse prevention and control program (Tr. 129). He testified about some of the testing procedures and minimum levels of THC required for a positive test result (*id.* at 132-133). He was cross-examined, but the defense did not attempt to attack the reliability of the urinalysis test or its scientific underpinnings (*id.* at 134-138, 141-142).

[3] As required by the *Urine Testing SOP* (at 1), petitioner's urine specimen was tested twice, first by radioimmunoassay (RIA) and then by both RIA and gas-liquid chromotography (GC). Only after both tests were performed was petitioner's specimen identified as positive (GX 15).

[4] Those individuals could have been called, and their production would have been at government expense. See, *e.g.*, *Manual for Courts-Martial,* Rule for Court Martial 703 (1984) [hereinafter cited as *Manual,* RCM]. Petitioner's failure to request their presence at trial is perhaps best explained by the fact that his urine sample was retested by another testing procedure (gas chromotagraphy/mass spectroscopy), which he concedes is reliable (Pet. 11 n.19) and which confirmed the results of the test on which his conviction is based. An electronic message confirming the result of that test was offered into evidence (GX 12), but was excluded by the military judge because "[t]here [had] not been an ade-

defense to the charge of wrongfully using marijuana was that his urine sample had been switched with those of his roommates or that his positive test result was attributable to passive inhalation (*id.* at 23, 136-137, 201, 211-212).

ARGUMENT

1. Petitioner does not challenge his conviction for willfully disobeying a superior commissioned officer by refusing to provide a urine sample when ordered to do so in September 1983. The trial judge's remarks at sentencing make clear that the sentence petitioner received was imposed because he had failed to comply with a lawful order, not because he had wrongfully used marijuana.[5] It is therefore most unlikely that

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quate foundation laid for introduction" (Tr. 170). Had petitioner taken affirmative steps to procure the technicians of whose absence he now complains, he would have enabled the prosecution to lay the proper foundation for admitting that test result.

[5] As the trial judge stated at sentencing (Tr. 239-241):

> Well Specialist Ridley, I have considered the character or your service, approximately five years in the service, according to my calculations; the fact that you've received a good conduct medal, I don't see any evidence that you've ever been reduced at anytime in your career, and the testimony indicates that both in Hawaii and here at Fort Ord you have been an above average soldier and have done your job. And I also believe that a soldier is entitled to one mistake. You had that opportunity, when that incident occurred on the 8th of July when you were found in that room full of cigarette—marihuana cigarette smoke, and you submitted to a urinalysis that came up positive, and you were under charges. During that period of time when you were under charges, you were again requested to and then ordered to take a urinalysis by your company commander who carefully explained the

petitioner's sentence would be affected even if his conviction for wrongfully using marijuana were set aside. In these circumstances, review by this Court of petitioner's claim is unwarranted, because even complete acceptance of his argument would afford him no practical benefit. Cf. *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976); *Barnes* v. *United States*, 412 U.S. 837, 848 & n.16 (1973).

2. Petitioner argues that the admission of the laboratory test results under the authority of Mil. R. Evid. 803(6) violated his rights under the Confrontation Clause.

a. Military Rule of Evidence 803(6) provides that a report of acts or events is not excluded by the hearsay rule if four requirements are met: (1) the report

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consequences of a refusal to take urinalysis, and you continued to refuse to submit a urinalysis sample. The proper answer to the company commander would have been at that time, "yes, sir, I will if I have to stay here all night, I'll give my urinalysis sample." You had no legal right, and that was explained to you, to refuse that urinalysis. That defiance of authority cannot be tolerated. I consider that to be the serious offense on trial here today. And indeed, you probably wouldn't have been here at all at trial, or at least not even facing the prospect of a punitive discharge had you not committed the additional disobedience on the 29th of September, that's where you made your largest mistake, I believe, the way I view the evidence in this court.

Although I have to give weight to the character of your service and your potential for rehabilitation, I also have to insure that the military justice system works, that the chain of command is respected, and that orders of superior officers over you to whom you gave an oath, is maintained. Accordingly, I'm prepared to announce my sentence. Will you and your counsel please rise.

The trial court then imposed petitioner's sentence.

was made at or near the time that the acts or events occurred; (2) the report was made by a person with knowledge of the subject of the report; (3) the report was made in the course of a regularly-conducted business activity; and (4) the regular practice of the business is to make such a report. *Manual* III-36. Rule 803(6) also specifically identifies "forensic laboratory reports" as being among the category of reports that fit within this exception (*ibid.*), in recognition of the fact that forensic laboratories function as "impartial examining centers" and that a laboratory report is "simply a record of 'regularly conducted' activity of the laboratory" (*Manual* App. 22, at A22-44). In this case, the *Urine Testing SOP* (GX 15) established the foundation requirements under Rule 803(6) for admission of the report of petitioner's urinalysis test. Petitioner does not argue that the test results were inadmissible under the rule. It is his contention that the provision of the rule permitting the admission of laboratory test results is unconstitutional.

The Court of Military Appeals has consistently held that laboratory reports made in the normal course of business and properly authenticated are admissible as business records, and that the Confrontation Clause does not require their exclusion.[6] Several federal courts of appeals and state courts of last resort have also upheld the receipt of laboratory reports over

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[6] See *United States* v. *Vietor*, 10 M.J. 69, 70-71 (C.M.A. 1980); *id.* at 74-75 & n.4 (Everett, C.J., concurring in the result); *United States* v. *Strangstalien*, 7 M.J. 225, 227-229 (C.M.A. 1979); *United States* v. *Miller*, 23 C.M.A. 247, 49 C.M.R. 380, 381 (1974); *United States* v. *Evans*, 21 C.M.A. 579, 581-582, 45 C.M.R. 353, 355-356 (1972); see also *Manual*, App. 22, at A22-44. Mil. R. Evid. 803(6) mirrors Fed. R. Evid. 803(6).

Confrontation Clause objections.[7] The only federal

[7] See, *e.g.*, *Kay* v. *United States*, 255 F.2d 476, 480-481 (4th Cir.), cert. denied, 358 U.S. 825 (1958) (laboratory analysis of blood alcohol level); *United States* v. *Ware*, 247 F.2d 698, 699-700 (7th Cir. 1957) (laboratory analysis of drugs); *State* v. *Cosgrove*, 181 Conn. 562, 568-585, 436 A.2d 33, 37-44 (1980); *Howard* v. *United States*, 473 A.2d 835, 838-840 (D.C. 1984); *Commonwealth* v. *Harvard*, 356 Mass. 452, 462-463, 253 N.E.2d 346, 352 (1969); *State* v. *Larochelle*, 112 N.H. 392, 394-397, 297 A.2d 223, 225-226 (1972); *State* v. *Malsbury*, 186 N.J. Super. 91, 98-101, 451 A.2d 421, 425-426 (1982); *State* v. *Smith*, 312 N.C. 361, 364-386, 323 S.E.2d 316, 318-330 (1984); *Coulter* v. *State*, 494 S.W.2d 876, 881-884 (Tex. Crim. App. 1973); *State* v. *Kreck*, 86 Wash. 2d 112, 117-121 & n.3, 542 P.2d 782, 786-788 & n.3 (1975); see also *United States* v. *Parker*, 491 F.2d 517, 520-521 (8th Cir. 1973), cert. denied, 416 U.S. 989 (1974); cf., *e.g.*, *McDaniel* v. *United States*, 343 F.2d 785, 789 (5th Cir.), cert. denied, 382 U.S. 826 (1965) (the Confrontation Clause does not bar receipt of a firm's internal investigative report as a business record).

Petitioner errs in asserting (Pet. 5 n.5) that the decision below conflicts with several state court decisions. *Moon* v. *State*, 300 Md. 354, 369-371, 478 A.2d 695, 703 (1984), cert. denied, 469 U.S. 1207 (1985), held that the Sixth Amendment forbade the introduction of a blood alcohol report as a business record where there were discrepancies on the face of the report. *Commonwealth* v. *McCloud*, 457 Pa. 310, 322 A.2d 653 (1974), relied on the state constitution to exclude a medical examiner's report of the cause of death. Finally, although *State* v. *Henderson*, 554 S.W.2d 117 (Tenn. 1977), ruled that the Confrontation Clause forbids the admission of a laboratory report of a drug test unless the laboratory analyst testifies at trial, that case, like *Moon*, relied on an interpretation of *Ohio* v. *Roberts*, 448 U.S. 56 (1980), that the Court rejected last Term in *United States* v. *Inadi*, No. 84-1580 (Mar. 10, 1986). *Inadi* ruled that the unavailability requirement discussed in *Roberts* only applied to prior testimony. Slip op. 8. Thus, the courts that have excluded laboratory reports may well alter their views in light of this Court's decision in *Inadi*. Review of this question is therefore inappropriate at this time.

case that petitioner claims to be in conflict with those decisions is *United States* v. *Oates*, 560 F.2d 45 (2d Cir. 1977). In that case, however, the court held only that the laboratory report did not fall within the reach of federal rule 803(6), which, unlike the military rule, does not expressly provide for the admission of laboratory test results. The *Oates* court did not decide whether the Confrontation Clause would have barred the admission of the laboratory report (560 F.2d at 80), although the court noted that the report in that case bore special indicia of unreliability that would have made the Confrontation Clause issue a difficult one (*id.* at 81).

This Court has indicated that the Confrontation Clause does not forbid the receipt of evidence as a business record. *Ohio* v. *Roberts*, 448 U.S. 56, 66 n.8 (1980) (citation omitted) (" 'Properly administered the business and public records exceptions would seem to be among the safest of the hearsay exceptions.' "); *Dutton* v. *Evans*, 400 U.S. 74, 95-96 (1970) (Harlan, J., concurring in the result). The business records exception, which has roots deep in the common law,[8] rests on the principle that records prepared in the normal course of business are highly accurate and reliable and thus may be admitted at trial without adversely affecting the fact-finding process.[9] That

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[8] Wigmore traces the lineage of the exception to the early seventeenth century. 5 J. Wigmore, *Evidence in Trials at Common Law* § 1518, at 427 (J. Chadbourne rev. ed. 1974).

[9] See, *e.g.*, E. Cleary, *McCormick's Handbook of the Law of Evidence* § 306, at 720 (2d ed. 1972); 4 D. Louisell & C. Mueller, *Federal Evidence* § 446, at 646-647 (1980); 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 803(6)[01], at 806-176 (1985). In fact, such records will often be more reliable than the testimony of the persons who recorded the informa-

principle is applicable in the case of laboratory reports, just as in the case of other types of business records. Laboratory analyses are routinely performed by laboratory technicians who have no motive to falsify the report of the results.[10] While the laboratory tests themselves may be subject to challenge as unreliable, the flaws, if any, in the testing technique are not addressed by the Confrontation Clause claim raised here.

Petitioner's claim is that he was denied the opportunity to cross-examine the laboratory technician about the accuracy of the entries the technician made on the laboratory report. Cross-examining the technician, however, would not address petitioner's real objection—the claim that the urinalysis test itself was unreliable. Thus, petitioner's claim in this case is misfocused. The Confrontation Clause does not require that an out-of-court laboratory test be reliable; the Clause requires only that the report of such a test be reliably prepared. Where laboratory reports are routinely prepared in accordance with the provisions set forth in the *Urine Testing SOP*, the likeli-

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tion onto the records, given the large number of records and entries that must often be made by a business. 4 D. Louisell & C. Mueller, *supra*, § 446, at 646.

[10] See, *e.g.*, *Kay* v. *United States*, 255 F.2d at 481; *Howard* v. *United States*, 473 A.2d at 839; *State* v. *Cosgrove*, 181 Conn. at 568-572, 436 A.2d at 37-39. As the Fourth Circuit explained in *Kay* v. *United States*, in the context of a laboratory report identifying the defendant's blood alcohol content: "The alcoholic content of the blood, the evidentiary fact sought to be proved by the certificate, may be accurately determined by well recognized chemical procedures. It is an objective fact, not a mere expression of opinion, and its proof by introduction of the certificate violates no constitutional right of the defendant." 255 F.2d at 481.

hood that the report was reliably prepared is sufficiently high that the Confrontation Clause does not require live testimony on the issue. Of course, if petitioner had seriously believed that there was a flaw in the manner by which the report was prepared, he was free to call the laboratory analyst to the stand to testify. Cf. *United States* v. *Inadi*, No. 84-1580 (Mar. 10, 1986), slip op. 9-10.[11]

b. Petitioner argues (Pet. 5-8) that the laboratory report should have been excluded, because the urinalysis was performed at a so-called "police laboratory" for the purpose of litigation and because the determination that his urine sample contained marijuana was an evaluative opinion. Both claims are in error. The Army's drug testing program serves a number of functions other than producing evidence for court-martial proceedings.[12] And petitioner has failed to

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[11] *Manual*, RCM 703; see also, *e.g.*, *Kay* v. *United States*, 255 F.2d at 481; *United States* v. *Vietor*, 10 M.J. at 77; *Howard* v. *United States*, 473 A.2d at 839; *Commonwealth* v. *Harvard*, 356 Mass. at 460, 253 N.E.2d at 351.

[12] Dep't of Army Reg. 600-85, *Interim Change No. I03, Alcohol and Drug Abuse Prevention and Control Program* para. 3-16a, at 2 (Apr. 29, 1983), states that the objectives of the Army's urinalysis program are:

1. To determine a member's fitness for duty and the need for counseling, rehabilitation, or other medical treatment.

2. To determine the presence of controlled substances in a member's urine or blood alcohol content during participation in the [Alcohol And Drug Abuse Prevention And Control Program].

3. To gather evidence to be used in actions under the Uniform Code of Military Justice (UCMJ).

identify any "evaluative" aspect of the urinalysis testing procedure.[13] Thus, because the laboratory personnel who analyzed petitioner's urine sample played a non-evaluative role, they were not witnesses "against" him, and the Confrontation Clause does not apply. *United States* v. *Beasley*, 438 F.2d 1279, 1281 (6th Cir.), cert. denied, 404 U.S. 866 (1971). Cf. *Phillips* v. *Neil*, 452 F.2d 337, 347-349 (6th Cir. 1971), cert. denied, 409 U.S. 884 (1972) (admission of medical record containing psychiatric opinion regarding the defendant's mental condition violated the defendant's right of confrontation).

c. Petitioner also claims (Pet. 9-11) that the urinalysis test performed on his specimen was unreliable. Petitioner did not object at trial to the admission of the laboratory report on that ground. Instead, he claimed that the laboratory report was not the "best evidence" and that he was entitled to cross-examine the laboratory analyst (Tr. 170; see *id.* at 211-213). Petitioner has therefore waived that claim by failing

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4. To gather evidence to be used in administrative actions.

5. To determine the presence of controlled substance in a member's urine or blood alcohol content for a valid medical purpose.

6. To serve as a safeguard at social gatherings where alcohol beverages are served to individuals who might otherwise not realize how much alcohol they have consumed.

[13] See *Kay* v. *United States*, 255 F.2d at 481; *State* v. *Smith*, 312 N.C. at 372-374, 323 S.E.2d at 323 (scientific advances in measuring blood alcohol concentration have removed the necessity for a subjective finding of impairment and have increasingly reduced the role of the operator in the objective determination of blood alcohol concentration).

to raise it at a time when the validity of his assertions could have been tested.[14]

In any event, petitioner's argument that the particular test performed in his case is unreliable is properly presented not as a claim that the admission of the laboratory report of that test violated the Confrontation Clause, but as a claim that the evidence was insufficient to support his conviction for the wrongful use of marijuana, because the urinalysis test itself was unreliable. That claim does not warrant review by this Court, because it is unlikely to recur. In 1984, the Department of Defense directed that the gas chromatography-mass spectrometry test, which petitioner agrees is reliable (Pet. 11 n.19), be used as the confirmation test in all urinalysis examitions. DOD Directive No. 1010.1 (Encl. 2), at 3-2 (Dec. 28, 1984). Accordingly, the question whether the urinalysis tests performed in this case were reliable is of no continuing importance.[15]

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[14] This is particularly true since the positive result of the testing procedure that petitioner now challenges was confirmed by another test procedure (see pages 4-5 note 4, *supra*) that petitioner concedes is reliable (Pet. 11 n.19). The trial judge excluded an electronic message regarding the confirmation test result on the ground that the government did not lay the proper foundation for admission. Pages 4-5 note 4, *supra*. If petitioner had challenged the reliability of the testing procedures used on his urine sample in a timely manner, the government could have easily taken the time to lay the proper foundation for the admission of the confirmation test.

[15] Contrary to petitioner's assertions, the testing procedures used in this case have been found reliable. "[A]t Fort Meade, the GC/MS [gas chromatography/mass spectroscopy] retest of 816 samples confirmed the presence of THC in 812 of the samples identified by RIA-GC. At the Naval Drug Screening

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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Laboratory in San Diego, the figure was equally impressive: 99.7%. These figures lend hard, empirical support to the contention that used together, RIA and GC procedures are sufficiently specific." *Review of Urinalysis Drug Testing Program —Legal Addendum* at 19 (Dec. 12, 1983).

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